

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CALVIN DONALD GRAHAM,

Defendant-Appellant.

UNPUBLISHED

February 18, 2000

No. 209820

Genesee Circuit Court

LC No. 93-049435- FC

Before: Jansen, P.J., and Collins and J.B.Sullivan*, J.J.

PER CURIAM.

Following a jury trial, defendant was convicted of attempted murder, MCL 750.91; MSA 28.286, and burning of a dwelling house, MCL 750.72; MSA 28.267. Defendant pleaded guilty to being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, and was sentenced to concurrent sentences of 26 and 2/3 to 50 years in prison for each conviction. On appeal, this Court reversed defendant's attempted murder conviction because of improper jury instructions, and remanded the case to the trial court. *People v Graham*, 219 Mich App 707; 558 NW2d 2 (1996). This Court declined to address defendant's sentencing issues at that time. *Id.*, at 712, n 1.

Defendant then pleaded no contest to assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and to being an habitual offender, second offense, MCL 769.10; MSA 28.1082. The trial court denied defendant's motion for resentencing on his arson conviction, and sentenced defendant as a second habitual offender to nine years and ten months to fifteen years in prison for the assault with intent to do great bodily harm conviction. Defendant now appeals as of right. We affirm.

Defendant argues that he was entitled to resentencing on his arson conviction because that sentence was affected by his attempted murder conviction, which was reversed on appeal. If a defendant's original sentence is valid, the sentencing court is without authority to resentence. MCR 6.429(A); *People v Thomas*, 447 Mich 390, 393; 523 NW2d 215 (1994). A sentence is invalid when it is beyond statutory limits, when it is based upon constitutionally impermissible grounds,

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

improper assumptions of guilt, a misconception of law, inaccurate information, or when it conforms to local sentencing policy rather than individualized facts. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). Although the authority of the court over a defendant typically ends when a valid sentence is pronounced, the court may correct an invalid sentence after sentencing. *Id.* However, determination of the proportionality of a sentence already imposed is an exclusively appellate function, and a trial court may not resentence a defendant based upon its determination that the initial sentence was disproportionate. *People v Wybrecht*, 222 Mich App 160, 168; 564 NW2d 903 (1997).

In this case, defendant has failed to establish the invalidity of his arson sentence. Defendant bases his argument on the fact that the original sentencing judge imposed identical sentences for arson and attempted murder without explaining his reason for doing so. However, this argument does not address the validity of the sentence. Standing alone, defendant's arson sentence does not exceed statutory limits for habitual offenders, and defendant does not allege that it was based upon constitutionally impermissible grounds, improper assumptions of guilt, a misconception of law, that it conformed to local sentencing policy rather than individualized facts, or that it was based upon inaccurate information. We conclude that that defendant's arson sentence was not invalid, and he was, therefore, not entitled to resentencing. *Thomas, supra*.

Defendant next argues that he is entitled to resentencing for both his arson and assault with intent to do great bodily harm convictions because they violate the principle of proportionality. "In Michigan, a defendant's sentence must be proportionate to the seriousness of the crime and the defendant's prior criminal history." *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1997), citing *People v Milbourn*, 435 Mich 635-636, 654; 461 NW2d 1 (1990). Sentencing guidelines do not apply to sentences imposed for habitual offenders. *People v Hansford (After Remand)*, 454 Mich 320, 323; 562 NW2d 460 (1997). Habitual offender sentences are reviewed for abuse of discretion. *Id.*, at 323-324. When sentencing an habitual offender, the court may properly consider a defendant's criminal history and his rehabilitative potential. *People v Cervantes*, 448 Mich 620, 627 (Riley, J) 635-636 (Cavanagh, J); 532 NW2d 831 (1995). These factors are relevant because, under the present framework of indeterminate sentencing, sentences are based more on an assessment of the offender than the offense. *Id.*, at 627. The Supreme Court has held that as long as the sentence falls within the permissible statutory enhancement, there is no abuse of discretion where the defendant demonstrates an inability or unwillingness to rehabilitate himself. *Hansford, supra*, at 325-326.

In this case, both of defendant's sentences were consistent with the applicable statutes. Moreover, we believe that defendant's arson and assault convictions, when viewed in conjunction with his prior felony convictions, "evidence[] that [] defendant has an inability to conform his conduct to the laws of society." *Id.*, at 326. Both sentencing judges noted defendant's extensive criminal history and his lack of remorse. Defendant's record includes breaking and entering, larceny in a building, prison escape, attempted uttering and publishing, and armed robbery. The violent nature of the instant offenses also militate in favor of a lengthy sentence. The victim in this case testified to defendant's history of violence toward her. The first sentencing judge, who presided at the original jury trial, found defendant to be beyond rehabilitation. The second sentencing judge, who took defendant's subsequent plea to the assault charge, noted defendant's lack of remorse when asked about his feelings for the victim's

suffering. We cannot conclude that the sentences were disproportionate to the offense and the offender. *Milbourn, supra*.

Finally, we reject defendant's claim that the judge improperly considered uncharged allegations when imposing defendant's sentence for assault with intent to do great bodily harm. The victim's statement at sentencing included uncharged allegations, some of which were assumptions on her part about defendant's culpability. The court acknowledged that the victim's allegations included, in part, assumptions of which she had no first hand knowledge. When he imposed sentence, the judge clearly indicated that he was not permitted to consider the victim's allegations of uncharged acts, but that they reflect the psychological trauma that she has suffered. We conclude that the court limited its consideration of uncharged acts to the overall anguish that the victim suffered, and did not take them into account when sentencing defendant.

Affirmed.

/s/ Kathleen Jansen

/s/ Jeffrey G. Collins

/s/ Joseph B. Sullivan